



The Daily Dish

FSOC and the Courts

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Eakinomics: FSOC and the Courts

The Dodd-Frank Act created the Financial Stability Oversight Council (FSOC) and empowered it to [designate](#) non-bank financial entities as Systemically Important Financial Institutions (SIFIs). That is as it should be — Congress creates law. At the outset, FSOC followed an entity-based approach to designating SIFIs — for all practical purposes, a focus on the size of entities — and used this to designate the insurers MetLife, Prudential, and AIG as SIFIs. Again, that is how policy should be made — the Administration implements law.

Today the FSOC meets and among the potential topics of its executive session is the future of its lawsuit against MetLife. Recall that after its designation, MetLife sued FSOC on the grounds that its designation process was “[arbitrary and capricious](#)” and, thus, in violation of the Administrative Procedure Act. The court found in MetLife’s [favor](#), including the fact that FSOC did not do a benefit-cost analysis of any sort. The issue at hand is whether FSOC should continue with the appeal or simply drop the case (technically, the Department of Justice litigates the case and makes the final call, but what FSOC decides will matter).

FSOC should drop its appeal.

Why? If FSOC were to win its appeal, it would put the courts in the position of making policy. It is good regulatory policy to pay attention to benefits and costs, and setting the legal precedent that any regulatory body can ignore them is letting the courts set bad policy. Further, since MetLife’s designation, the Administration has moved away from an entities-based SIFI designation framework to an activities-based formulation. Indeed, in [Treasury’s most recent report](#), it suggests an activities-based approach, as [AAF proposed directly to Treasury](#).

Specifically, the Department states: “Treasury’s position is that entity-based systemic risk evaluations of insurance companies generally are not the best approach for mitigating risks arising from the insurance industry. Rather than focus on entity-based systemic risk evaluations, insurance regulators should focus on potential risks arising from insurance products and activities, and on implementing regulations that strengthen the insurance industry as a whole. Also, while the FSOC maintains primary responsibility for identifying, evaluating, and addressing systemic risks in the U.S. financial system, the states are the primary regulators of the insurance industry in the United States, and insurance regulation at the federal level should be conducted in coordination with the states.”

It makes no sense to pursue a lawsuit where victory means contradicting two core tenets of Administration policy. Congress and the Executive should make policy; not the courts. FSOC should drop the appeal.